In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1142

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, AND BERNARD B. LYNN, DIRECTOR OF DEFENSE CONTRACT AUDIT AGENCY, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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1. The question presented by the petition for a writ of certiorari in this case is not whether the Defense Contract Audit Manual (the "Manual") is required to be disclosed under the Freedom of Information Act; rather it is whether the decision as to its status under the Act can be referred to a special master. As set forth in our petition (pp. 7-12), we submit that the policies of the Freedom of Information Act and Rule 53(b), Fed. R. Civ. P., preclude a reference of this question to a special master. See *La Buy* v. *Howes Leather Co.*, 352 U.S. 249.[1]

[1]The 1974 amendments to the Freedom of Information Act, cited by respondent (Brief in Opp. 7-8), confirm the use of *in camera* inspections by district courts in appropriate cases. The amendments do not refer to, much less authorize, the routine use of special masters.

2. Respondent emphasizes certain factual assertions, presumably for the purpose of suggesting that the Manual is not exempt from disclosure. As shown above, however, the status of the Manual is not presented in this petition. Moreover, respondent's factual assertions are misleading and in fact the Manual has not been disclosed to the public.

a. Although the Manual was cited by government counsel[2] to the Armed Services Board of Contract Appeals ("ASBCA" or "Board") in *LTV Aerospace Corp.* and *Advanced Technology Center, Inc.* (ASBCA Nos. 17130 and 17131), decided February 12, 1974, the Board did not order production of the entire Manual and has recognized that portions of the Manual may be privileged (Br. in Opp. 5a-8a).

b. A copy of the 1966 version of the Manual was placed in the Board's library without the authorization of the Defense Contract Audit Agency, and upon its discovery, was promptly withdrawn.[3]

c. One chapter of the Manual has been published by a private publisher without authorization of the Defense Contract Audit Agency. While, as a practical matter, publication moots the question of disclosure as to the material so published, it has no impact on unpublished portions of the Manual, nor on future revisions of the material so published.

d. Copies of the Manual have been distributed outside the Department of Defense only to other federal agencies and state and local governments, and to foreign govern-

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[2]As indicated in our petition (p. 10), in our view, the Manual should not be cited by counsel and is not a rule of decision in audit cases. See *The Boeing Company* (ABSCA No. 14370) 73-2 BCA par. 10,325, p. 48-753 (October 24, 1973).

[3]See the affidavit of Richard D. Kleman, Assistant Counsel of the Defense Contract Audit Agency, filed in the district court. (A copy of the affidavit has been lodged with the Clerk of this Court.)

ments that provide audit services for the United States. Copies of the Manual so distributed are stamped "For Official Use Only" and their delivery is accompanied by a letter explaining that the Manual is exempt from disclosure, and that recipients must take measures to ensure protection of its status.[4]

3. The reference of this case to a special master, and the district court's stated intention to follow this procedure in all complex Freedom of Information Act cases, is an example of the increasing tendency by district courts to refer entire categories of cases to United States Magistrates or special masters. The importance of this question is underscored by this Court's granting of certiorari in *Weinberger* v. *Weber*, No. 74-850, on March 24, 1975.

For the foregoing reasons, and for the reasons set forth in our petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[4]See the answers to interrogatories filed in the district court by Sybil L. Taylor, Records Administrator of the Defense Contract Audit Agency, a copy of which has been lodged with the Clerk of this Court.